# EXPERTS IN CRIMINAL PROCEDURE AND THE MYTH OF THE JURA NOVIT CURIA PRINCIPLE*

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## I.

Many people believe, perhaps correctly, that the learned man of the middle ages was skilled in all sciences. In our days the concept of the learned man is certainly understood in a different way. Whereas human knowledge of the world in the middle ages would probably have not filled more than a few volumes, at present, writings on a single branch of science fill libraries. The consequence of the cumulation of knowledge is specialization, which entails a further consequence, i.e. the lack of knowledge in provinces beyond the limits one's own special field of expertise. The learned man posseses at most some general knowledge of the various branches of science and trade, and it is only his own speciality where deep knowledge may reasonably expected of him. Of course, all what is written in the previous sentence is only a relative truth since even in our times there are people who possess deep and detailed knowledge belonging to various branches of science, sometimes quite distant from each other. However, such exceptional phenomena do not change the general rule and most (one may say avarage) human beings are experts only within the boundaries of their own trade or profession and are dilettants in other fileds at the very best.

In the administration of justice the members of the investigating authority, prosecutors and the court, frequently need skills and knowledge belonging to the realm of other than their own speciality so that they can establish and evaluate facts. This need is the consequence of the great variety of matters demanding the attention of the law. In addition to cases where the establishment and the evaluation of the facts do not require more than general experience and the sufficient knowledge of law, there are others (and in a high number) where neither the discovery nor the evaluation of certain facts is possible without the use of special expertise going well beyond the limits of law. The external assistance, needed to perform these tasks, is provided by experts.

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The employment of experts is not a new development in the administration of justice. The expert was a figure known to the legal systems of antiquity and the development of the institution of the expert can be followed in mediaeval law, too.[1] But, due to scientific progress and the development of technology, the administration of justice of modern times is simply inconcievable without judicial experts. The role and the legal position of the expert has always been much discussed in legal writings, which shows clearly the importance of his activity in the administration of justice.

As far as the legal position of the expert is concerned, the opinions expressed by various scholars in different times are far from being uniform. Some authors had the view that the expert was an assistant of the judge, others regarded him as a special type of witness, others again believed him to be a judge of scientific matters. All these and other views appearted, then disapeared just to reappear again, in the theory of law and it is a sign that they, although never perfect definitions, expressed one or another characteristic feature of this special procedural figure.[2]

Since the legal position of the expert and the evidentiary role of his opinion are impossible to analyse separately, scholars have always paid serious attention also to the latter. The opinions, naturally, are different again. Some authors say that the expert's opinion must not be regarded as evidence.[3] Clearly, these scholars believe the expert to be the assistant of the court or judge of facts or scientific matters. Others, considering the expert a participant of the evidentiary process, try to find ways of applying the basic concepts of evidence to the expert opinion. They try to find the answer to the question whether the expert's report is a piece of evidence or a means of evidence; or whether the expert's report has special characteristics rendering the facts stated in it more significant than other types of evidence, or not. All these views are well known and for the lack of space I am not going to describe them in detail, neither do I intend to do more than to state my own position in connection with that issue.

In my opinion the *expert is a participant of the evidentiary process*, differing from others as far as it is through using his professional knowledge and skills that he participates in the establishment or evaluation of facts. The result of his activities is the *report, which is an evidentiary means*, and the *facts stated in it form evidence.*

If it is accepted that the activity of the expert belongs to the realm of the evidentiary process and his report is a means or source of evidence, it is clearly from the point of view of evidence that the analyses should be done. It seems to me any other positon would be quite difficult to maintain even if the peculiar features of the role of the expert in the professional evaluation of the facts were perhaps even more difficult to deny. In criminal procedure it is only such an attitude that makes possible to allow the parties to check and dispute the correctness of the expert's report, contributing by that to the right establishment of the facts. If the activity of the expert is not part of the evidentiary process the parties cannot make any comment concerning his report, they may not dispute its correctness and credibility,

and the lack of such right is incompatible with the idea of contradictorial procedure.

In common law systems it cannot be doubted that the expert is a participant of the evidentiary process, since he is a witness of a party, distinguished from other witnesses by being entitled to testify his opinion. In practice, precisely this is expected of him.

The legal position of the expert is more problematic in procedural systems where his participation in the procedure is iniatiated by a decision of the proceeding authorities. However, the fact that the expert is appointed by the proceeding authority does not elevate him to the rank of the authorities and does not put him above the other participants of the evidentiary process. Another point to be mentioned here is that as it is not inconcievable in common law systems that the court should appoint an expert, in the same way, it is possible in other systems that the appointment of the expert should be initiated by the parties or the parties should obtain expert evidence themselves. In a sense, this is a technicality, having small effect on the essence of the matter.

In the above parts expertise has already been mentioned and I have made reference to the "opinion" of the expert which may appear in his report. However, the expert's conclusions are determined, in addition to his professional knowledge, by the matter examined by him – in most cases without some material to be examined the experts has nothing to form an opinion about. Naturally, it happens that the expert does not have to examine anything and his task is merely to report or to explain certain scientific or professionally established and accepted facts, principles or knowledge. In such cases, however, there is no opinion, since the expert reports on matters of knowledge and not on that of opinion.

On the basis of all this, the *sources of the evidence provided by the expert are the knowledge and skill of the expert, i.e. his expertise, the material examined by him and his reasoning.* (I do not mention the process of the examination of materials separately since it is an indisposable part of learning the characteristic traits of the material and, in this way, cannot be separated of that.)

In this paper some issues related to the concept and scope of expertise will be discussed.

## II.

The necessity of expertise is generally recognised as a natural precondition of participation as an expert in the evidentiary process. However, as far as the concept of expertise is concerned, there is more difference than agreement among the views of the scholars. The debates in the literature have always been interesting, but from the practical point of view they have not been very productive. For example, Hungarian empirical studies show that the practice did not make too much use of the scholarly views.[4]

The concept of expertise is rather important in criminal procedure, since it depends on its interpretation what is considered a problem the so-

lution of which requires an expert. The authorities proceeding in criminal cases, disregarding the opinions experessed in legal writings, frequently employ experts when no special expertise is needed to establish or evaluate certain facts.

In the various legal systems the basis of appointing an expert is the need for expertise. The Hungarian Code of Criminal procedure mentions special expertise, the Polish Code speaks of special knowledge, the law on evidence in California names special knowledge, skill, experience, training or education as the qualifications of an expert. The examples, although random, reflect the essence of the matter. It seems that the key term is special expertise, but to understand its meaning one has to see what is the standard to which special expertise is compared.

For a starting point I take the fact that any kind of professional knowledge includes certain elements known in a broader circle of people than those who are specialists in the particular field. The province of the necessary knowledge of a profession or a trade includes parts belonging also to the realm of other fields and sometimes these elements cannot be considered as professional knowledge in the strict sense of the word. Skill in elementary arithmetics may be mentioned here, as an example and actually it is more a matter of everyday knowledge than professional expertise. When the establishment or evaluation of facts requires such type of knowledge, it is superfluous to employ and expert.

The province of knowledge of all professions includes, of course, certain elements important also to other fields and not only to the one in question, but not belonging to the realm of everyday common knowledge. The fact that the intensity of light decreases in proportion with the sqaure of the distance from its source is well known for example by photographers or biologists working with microscopes or by engineers designing optical instruments and it cannot be considered commonly known, even if it is not a scientific fact known only by specialists.

Finally, there is a type of knowledge, which belongs clearly to the domain of professional knowledge, due, simply, to the fact that only the specialists of a particular field need it. For example, the knowledge of the most expedient technique of appendoctomy is not particularly needed by anyone outside the medical profession.

It is only natural that the dividing line between various professional fields are far from being rigid and the province of knowledge of any particular field keeps extending. For this reason one would find to difficult to name any element of professional knowledge that is necessarily known by only the members of single profession but unknown in all other fields. It can be added that knowledge belonging to the province of a certain profession is open also for the lay and the non-professional also may have certain expertise in a field.

Thus, professional knowledge, expertise, is relative from the point of view its depth and comprehensiveness and, in terms of expertise, there may be significant differences among the professionals of the same field.

Another important, perhaps fundamental factor of relativity is the field from the aspects of which expertise is examined. For those who pursue the same profession, the possession of the knowledge of the particular field is not special expertise but a natural requirement. For the members of the same profession, special expertise is having a knowledge not posessed by fellow professionals in general. One might perhaps say that a butcher or a baker would regard the skill needed by a candlestick maker as special expertise and a mathematician writing computer programs probably lacks the knowledge necessary to repair the broken down machine because it is special knowledge from his point of view. And perhaps it is justified to take an example somewhat closer to my own topic: Could it be denied that the expertise of the trained lawyer is special knowledge from the point of view of the medical expert participating in a criminal case?

The viewpoint, it seems, is a strong factor in determining the special nature of expertise. And, since *in criminal procedure* it is the viewpoint of the proceeding authority that is decisive and the expertise of such authorities embraces primarily the knowledge of law, *special expertise means knowledge falling outside the province of law.*

The use of expertise belonging to someone else's profession is evaluated in the factifinding process of criminal procedure in a way different from other fields. While expertise in other fields can be directly used in one's own profession in many spheres of activity, the law of criminal procedure does not allow the members of the proceeding authorities to make direct use of their expertise in other fields than law in the evidentiary process. Naturally, to be an expert in any profession, in addition to law, is not prohibited for a member of the proceeding authority either. On the contrary, such knowledge is clearly useful, but it may not be used to prove relevant facts.

The reasons of that attitude are closely related to the very nature of the procedure and it would be hard to deny their justification. Apart from anything else, I refer only to the principles of the contradictorial procedure: if facts established by the proceeding authorities, particularly by the court, through the direct use of their non-legal expertise, were taken into account by them as evidence, the principles of contradictorial procedure would be violated.[5]

The special expertise of the members of the proceeding authorities, consequently, may not substitute for the expert's report but itt may have its use in the process of evaluating the expert evidence. This is a consequence of the principles of the evidentiary process. As the members of the authorities may not use their private knowledge of the relevant facts (if a person was a witness to an event relevant in a case, he may not be a judge at the same time, for example), the same way they may not use their special skills instead obtaining expert evidence. If it were allowed, the interests of the parties would suffer: they have the right to dispute the significance of a piece of evidence or the reliability of a witness or the correctness of an expert's report, but they hardly could do that (or successfully do that) when the authority forms the expert opinion itself.

## III.

In the doctrines of law there are some general rules related to the province of knowledge of the proceeding authorities.

*Firstly:* The authority knows the law and the member of the authority may, actually is obliged, to make use of his knowledge.

*Secondly:* Knowledge belonging outside the law may be used by the members of the authority only to the extent and in the way as it is accepted by the law. The facts that are relevant for the case have to be proved unless there are legal exceptions to the rule: knowledge, if not possessed by everyone, nocessary, however, for deciding the case, has to be introduced through evidence even if the member of the authority posseses it.

Evidentiary rules in criminal procedure, while rational from certain special point of view, are not always rational in terms of economy. It would be difficult to say that limiting the use of the private special expertise of of members of the authority renders the evidentiary process economical. Still, rationality is present: if it is admitted that the contradictorial procedure is the right way to discover the truth (and it is generally admitted) then the rationality of the guarantees required in a contradictorial procedure must also be admitted. And it would hardly be easy to eliminate the rules excluding private knowledge as evidence from the rules having the nature of guarantee.

However, it is rationality again that requires the acceptance of rules which allow that certain facts could be established without evidence, or certain non-legal knowledge could be used. Facts that do not have to be proved are, among others, accepted scientific principles, the matter of common knowledge and self-evident facts. (The issue is discussed by Tibor *Király* in detail.)[6]

In Hungarian legal writings the concept of special expertise is discussed mostly in connection with its lower limit. Some authors believe that the lower limit of special expertise is the general educational level of the citizens, others are of the opinion that it is the general professional expertise of the members of the proceeding authorities. Without describing the different arguments, I have only a few remarks on the issue.

József *Gödöny* has pointed out that the concept of special expertise has changing contents. As a consequence of scientific and technological progress, new and new discoveries are added to the province of knowledge of the various professions while other elements cease to be part of special professional expertise and become common knowledge.[7] One has to agree with him and may say that the concept of special expertise expresses contents depending on space and time.

Tibor *Király* approaches the problem from the opposite pole. He observes that the "generally known" is a concept of changing contents, and the contents of that relative concept are not the same in our days as were in 1938; and in Hungary, it expresses something else than in any other country.[8]

The law admits the significance of common knowledge, commonly known facts do not have to be proved. It is also an accepted principle that no special expertise is needed to establish or evaluate facts if general knowledge is sufficient to do so. Setting the lower limit of special expertise is important precisely for the very fact that it is to this limit that the proceeding authorities may go in using their knowledge extending over the realm of law, beyond that an expert has to be employed. It is easy to see that the correct setting of that limit is a step toward preventing the unnecessary use of experts. It is a different matter that the proceeding authorities quite often appoint experts to answer question which can be answered on the basis of ordinary, everyday experience.

My opinion is that the concept of *special expertise embraces knowledge not belonging to the province of law and going beyond the limits of general common knowledge.*

But if the limits of expertise on the side of the authorities are examined in other words, if we want to know the limits beyond which the authorities are obliged to seek the assistance of an expert, the limits of the special expertise on the side of the expert also should be determined. It is quite clear that the expert may use the whole of the knowledge belonging to the province of his own profession. The answer is not so simple when the question is whether the expert may or may not use his knowledge of other than his own speciality. In short, it is the matter of the *expert's competency.*

It would be difficult to dispute that due the nature of his tasks the expert obtains sometimes considerable skill and knowledge in fields not belonging to his own speciality. In fact, this is one of the factors that make an expert "experienced". Most probably, the medical expert can make good use of his knowledge of forensic ballistics when examining a bullet wound and the firearm expert also finds his knowledge in forensic medicine useful, when the distance of the shot killing the victim has to be estimated. One could find a lot of similar examples. However, the availablity of such examples does not mean that the expert is entitled to give an opinion in questions not belonging to his own specific feield of expertise.

In the law evidence, great importance is attributed to the competency of the expert, the lack of his competency in practice equals to the uselessness of his opinion. Although the rules of the examination of competency may differ in the various systems, the aim is the same, namely to insure the expertise on the part of the person performing as an expert. As it has been pointed out: the expert lacking competency is a pseudo-expert, and his opinion does not fit to prove the truth (Székely).

It is, of course, not an easy question to answer, what belongs to the competency of one type of expert and what to the other's. Thus, it is not without reason that Hungarian law makes it the obligation of the expert to inform the authority if answering a certain question does not belong to his competency. Other legal systems follow a different pattern. In common law systems the expert's qualifications are decisive, and if they are not adequate, his opinion is not admissible.

The problems of competency, in general, cannot be discussed here. There is, however, an issue related to it, which seems to evoke very strong feelings. The views and the stated opinions of the authors frequently are coloured by boiling emotions and in certain cases even the traces of logical reasoning cannot be discovered in the arguments. In the following parts I am going to attempt to discuss that problem, often described as the *issue of law in the expert opinion.*

## IV.

In the literature of expert evidence, there are two major subtopics related to that main issue. The first one is, whether the expert should be allowed to express an opinion on an issue of law, and the second is the permissibility of the employment of the so-called *expert of law.* From the two, it is the former that raises smaller problems. It is remarkable, though, that the authors express the same negative attitude in both cases, although there is a difference between the two, which is worth keeping in mind.

*a)* The authors share the view that the expert may not answer questions concerning issues of law in his opinion. János *Székely,* quoting *Rahunov,* takes the position that expressing an opinion on issues of law is not the task of the expert. According to Kálmán *Vass,* no expert's competency embraces the examination and evaluation of issues of law.[9] Since there is no difference among the authors as far as the essence of the matter is concerned, there is no need to describe other wiews. It is, perhaps, not without foundation if one discoveres certain amount of professional jealousy in that uniformly negative attitude.

From an external viewpoint, legal knowledge is an expertise, and if it is prohibited for the lawyer to use directly his knowledge of other fields, he may rightly expect that his field of special expertise should not be invaded by outsiders. According to everyday experience, many people believe that they "know the law" just because they are familiar with its certain elements, and it is not infrequent that judicial experts think the same way. Reaction to such opinions is not even jealousy in the original sense of the word, it is rather a justified protective feeling for one's own profession. As the worker of a clothing factory who has been sewing buttons on for a long time with enormous skill is far from being a tailor, a person with superficial or everyday legal knowledge should not vindicate the right of expressing an opinion on issues of law in court.

There is, however a much firmer basis for the mentioned negative attitudes. And this is the simple fact that the authorities must not entrust the expert with deciding issues of law, since it would amount to transferring their functions. It is the proper authority and only the authority that should decide the issue of law and the expert's role is limited to the process of proving facts. Any other kind of cast is unacceptable, for it would be senseless (if the issue of law is decided by the expert, there is no need for the authority).

It is a different matter, that sometimes the expert misunderstands his role and reports also on his position concerning the issue of law, in addition to his professional conclusions. This, of course is unacceptable as it is unacceptable that the authorities should ask for his opinion on issues of law.

*b)* As far as the other problem – the employment of the expert of law – is concerned, the formulation of the arguments is much sharper and also much less convincing. János *Székely*, for example, states firmly that no expert may be used in issues of law. As far as the existence and contents of the various legislations are concerned it is precisely the authority that has special expertise, and if there are doubts, the authority may make enquiries but may not employ an expert. *Székely* quotes *Eisman*, who also is against the idea of the expert of law. *Eisman* points out that the examination of the contents of the provisions of law is not a task for judicial experts and, as a decisive argument, he adds: the mandatory rules are written for broad layers of people and are always understable for them.[10]

Interestingly, *Székely* simply declares that the employment of the expert of law is prohibited, while *Eisman's* argumentation is not very convincing. He explains the prohibition by saying that the provisions of law are always understable for those who are addressed by them. This statement is not necessarily true in every case. Accepting, however, that those who are addressed by the provisions of law can always understand them, one still asks, whether the authorities can always understand those provisions, too. I answer the question in the negative and in later parts I am going to explain why.

## V.

One has to admit that the idea of employing an expert of law by the authorities proceeding in a criminal case is startling, if not shocking, from the traditional point of view. But if one tries to see the realities behind the presumed legal expertise of the proceeding authorities, he has to realize that many of those who participate in the administration justice as members of the authorities, have only an imcomplete knowledge of law and are familiar only with certain segments of it. The simplest way to put it is to make a distinction between those who have a law degree and those who do not. The latters do not posses any special expertise in the field of law, their knowledge in that province – similarly to other areas – is less than professional. Thus, it is illusory to speak of the legal expertise of the authority in the sense that every member of it posseses that expertise. It is more realistic to say that the authority has the necessary legal expertise, because it has members with the required special knowledge in law. In that sense even the investigating authoritiy has legal expertise, although the proportion of members without legal education is the highest there, among the authorities participating in the administration of justice. All this perhaps may render the idea of employing external legal expert by the authorities less shocking.

According to the traditional attitude, the expert of law is alien to the administration of justice. In Hungarian legal writings for example, the authors even in recent times treated the "*jura novit curia*" principle as an axiom. This is why the idea of the expert of law was rejected by many authors without any explanation, which created the impression that the idea is silly or the invention of the devil. It is advisable, however, to examine from time to time the validity and correctness of the axioms we use, since the changes of the circumstances may render certain axioms obsolate. As far as the *jura novit curia* principle is concerned, if we are to examine its present value we have to set out from its original meaning.

As to the interpretation of the principle the first thing to note is that in its original sense it expressed the presumption of the court's knowledge of law. The persumption did not extend to other authorities participating in the administration of justice.

There has never been a principle to support the presumed legal expertise of the other authorities. We do not know a principle saying that the public prosecutor or the investigator knows the law *ex officio*. Neither is there any rule or presumption saying that an attorney, who places his legal expertise at the disposal of others as his profession, knows the law.

All this is evidently in connection with that in the administration of justice final decision in the cases belongs, in general, to the court and the persumption supports the faith that the decision of the administer of justice is correct. It is probable that the principle in fact is not a persumption, rather it is a rule[11] which is to help the activity of the court and to exclude that the parties could dispute its legal expertise (i.e. that court is familiar with all the relevant provisions of law). At the same time the law recognizes the possibility of the incorrect application of the relevant provisions and provides for a remedy by allowing appeal in issues of law.

It seems, however, that the original function of the rule is disregarded today and many jurists take the *jura novit curia* principle at its face-value without ever trying to see, whether it is a true or a false proposition. In my opinion, such an examination would not be a wasted effort. If the principle is not more than a rule aimed at assisting the operation of the court, the only question to be answered is whether we need it. If the principle is supposed to express the truth we have to see, whether it is really true, or not. If the principle is true, the dispute is pointless, but if it is not, a decision has to be made: Should we insist on maintaining it or should we find some more realistic means to ensure that the court's lack of knowledge of law could not be a basis for an attack on its judgement. Before going on, in order to avoid misunderstanding, I have to make a short remark.

I do not wish to identify legal expertise, or legal knowledge, with the knowledge of the positive law. But in this discussion, when legal expertise or the knowledge of law is mentioned I refer to the knowledge of positive law. It is only natural that the correctness or validity of the *jura novit curia* principle is examined from such a perspective, in accordance with its original meaning.

The principle at the time of its formulation was in complete harmony with the prevailing views in Hungary on the essence of criminal procedure. When the procedure is considered in theory as consisting of the preparatory and the trial phase, somewhat less significance is attributed to the activities of the investigating authority and of the prosecutor before presenting the accusation to the court, i.e. to the preparatory phase. Consequently, the legal expertise of these authorities does not have to be buttressed.

There is however, a theory accepted in a number of countries, including Hungary, according to which criminal procedure should be considered as a homogeneous unity, in spite of the existence of naturally distinguishable phases. The effects of the theory are well reflected also by the literature on expert evidence. In Hungarian legal writings, for example, the authors, sometimes without referring expressly to the underlying theory, mention "the authorities" when discussing special expertise or the appointment of experts, and not only the court. It is logical: in the homogeneous procedure the authorities have to be treated equally, although their functions are different. As far as the knowledge of law is concerned, it is beyond doubt that all the authorities of criminal procedure need it. After all, the investigating authoritiy decides issues of law when starts or terminates an investigation, the prosecutor also uses legal expertise when makes the decision to prosecute, etc. And it would be difficult to deny that these authorities display certain activities having the character of the administration of justice in a sense: they terminate cases with finality. In Hungary, for example, about half of the started criminal proceedings come to an end before the trial phase. So, if we wanted to amend the *jura novit curia* principle so that it would express the realities and theories of the present, we should say "the authority knows the law ex officio", and not only the court. However, it is not certain that such a statement is born out by facts – as pointed out in above parts. But it is perhaps unnecessary to buttress the the legal expertise of the authorities by a presumption, neither the reinforcement or increase of the prestige of the authorities nor other considerations require that. The extension of the scope of the principle, thus, is not really necessary.

But let us examine now whether the principle in its original sense is valid or not in our days. Thus the question is, whether it is true that the court knows the law, or not.

I know well that such a formulation of a question provides good chances for misuderstanding or misinterpretation. So, before anyone could conclude the opposite from the question, I hurry to say that I do not intend to accuse the court with the lack of legal expertise. But I have also to say, that I, for one, answer the question in the negative. I trust I shall be able to show there is no real contradiction between the two statements.

## VI.

It seems that the increasing number of legislations is a growing concern for the lawyers of many countries. Indeed, the body of legal norms is getting more and more vast and difficult to survey. The authors complain about the quantity of new laws and other legislations, and the figures are really surprising. According to certain estimations the increase in the body of norms in force between 1968 and 1980 in Hungary was 25 per cent.[12] The number of legislations in force was more than 5000 in 1984, according to the Hungarian Ministry of Justice. All these figures, however, show only the top of the iceberg, since certain lower level sources of law are not included.

No doubt, the majority of those norms never play any role in criminal cases. But even the fragments represent a quantity of norms too big to expect the judges to have a comprehensive knowledge of them. One might even say that the knowledge of the mere existence of certain norms cannot be a reasonable expectation either. All this, however, is not more than a difficulty, which can be eliminated. Even if the knowledge of all the norms of law in force cannot be a realistic expectation, it is reasonable to expect that the judge should be able to look for and find the relevant norms. It is a question only of a good computerized system, which does not present more than practical problems.

Practical problems alone hardly could justify the rejection of the *jura novit curia* principle as a requirement but they cast serious doubts on its truth. From here the next step is to conclude, that at present, the courts could solve the problems originating from the pullulation of legislations by making use of the expertise of the specialists working in the relevant fields. The question is what the ways of employing the specialists are, i.e. what solutions of procedural law should be found in order to overcome the legal and theoretical obstacles.

There is another problem related to the issues of legal "overregulation" and it concerns the contents of the legal norms. A significant part of the norms regulates or is related to matters of technology or production, etc., the deeper understanding of which requires a knowledge extending well beyond the limits of the knowledge possessed by the average jurist. To understand these norms one needs to know the field the norm is supposed to regulate. When the court proceeds in a criminal case and such a norm is relevant for the correct decision, its contents sometimes cannot be discovered by using the regular methods of interpreting the law. There might even be instances when simple grammatical interpretation is impossible, since these norms use, of course, the professional terms, the terminology of the field concerned, and to understand them one needs considerable knowledge of that field.

Such legislations are first of all certain regulations of industrial security measures, technological regulations etc., which are important enough to require the form of a statute. Such legislations are frequent in heavy industry, chemical industry, transport, mining, etc. Considering the nature

of the matters regulated in them, i.e. the fact that the professional considerations of the field in question are the dominant in them and these elements take only the form of a statute, these norms can be considered as "quasi statutes" or "legal norms", at most. It would be easy to conclude that the quasi statutes actually do not belong to the body of law, at least not in the sense that the courts should know them, which would be equal to saying that the *jura novit curia* principle is still valid. As a consequence, any further debate would be needless: dealing with quasi statutes is not dealing with law and what is not an issue of law can be dealt with by an expert according even to the most conservative view.

I fear, this radical solution is not the perfect one, since it leaves the question unanswered, which one is a quasi statute an which is a "real" one. And it can be added, if quasi and real statutes are clearly distinguished, one cannot be sure that the body of real law is not too vast to expect the court to know it.

Although the facts about the number and nature of the legislations are well-known, the idea that the court might not know the "law" (even in the limited sense of positive law) seems sacrilegeous: the illusion that the judge possesses a complete knowledge of law is not fading. In Hungarian legal writings almost every author repeates the statement: the court knows the law. However, the the voiced idea cannot convince me just because it is repeated many times and it does not convince others either. János *Székely*, for example, who is clearly an adherent of the *jura novit curia* principle, is not convinced himself about the truth of it, since after declaring that the court knows the law he immediately adds: if it is not so, the court has to make enquiries, but an expert of law may not be used. It means that *Székely* himself does not believe the court knows the law but he accepts the principle as a means to put the legal expertise of the court beyond doubt. Only that can be an expalantion of the fact that in his opinion an informal enquiry is allowed but the appointment of an expert (i.e. seeking evidence) is not.

In my opinion, the expert of law is not such a devil with hoofs and tail as seen by certain authors, nor is he a super "jurist" *(Székely)* replacing the judge. In my opinion, *the expert of law*, would not decide in matters of law, but *would give evidence of the existence of certain statutes or legislations and would explain their contents*. Proving the existence and contents of certain provisions of law is not passing decision on a legal matter regulated by that particular piece of legislation.

I fully agree with all those who object to the idea that the expert should decide any legal issue or even declare his opinion of such matters, either on his own iniciative or on the request of the proceeding authority. But I do not see any violation of the courts competency, if the expert reports on the existence of a certain legislation. Similarly, there is nothing wrong, in my opinion, with the expert's explaining the actual contents of certain norms, obscure for the jurist because of the use of the terms of the profession they are related to. What must not be allowed is the subsumption of the facts known by expert under the norm of law. It is always the procee-

ding authority, and the court, in particular, that has to decide, whether the facts of the case represent a violation of a norm of law or not, even if the contents of the norm were obscure for the authority without the expert's explanations.

In oder to avoid misunderstanding, I have to emphasize, the traditional views of the adherents of the *jura novit curia* principle are perfectly rational. The acceptance of the principle is one of the possible answers to the question asked earlier in this paper (i.e.: Does the court know the law or not?). The principle tells everyone that the court's knowledge of law has to be admitted and serves as an irrebuttable presumption.

It is not infrequent in law that presumptions or even fictions are used to solve certain problems or to prevent the occurence of problems, and the *jura novit curia* principle fits well among them, even if the court's full knowledge of law is not a proposition easy to defend. In addition, the potential knowledge of law on the part of the court has to be admitted, i.e. the authorities, including the court, posses the ability to know the law, the authorities have the professional knowledge and other facilities necessary to obtain the actual knowledge of positive law that is needed to pass judgement in the particular case in question.

From the *jura novit curia* principle it logically follows that the proceeding authority, including again the court, if not familiar with the relevant provisions of positive law, has to obtain the needed actual knowledge through informal enquiry, research, consultation or perhaps expert advice. And, of course, this is equal to giving up the advantages of a contradictorial trial.

On the other hand, the acceptance of the expert of law logically follows from the unacceptance of the principle. And, considering the facts related to the contents and quantity of legislations which clearly prove that the propostion expressed by the principle is not really true, one has to think twice before answering the question whether it is worth considering and maintaining the principle as valid and denying the very idea of the expert of law (rather in order to protect the myth of the court's full legal knowledge than on the basis of reality).

Although I have to admit that I am for the expert of law, I am aware my suggestions are not without dangers either. The first cause of concern is that the acceptence of the necessity of the expert of law leads to an uncertainity in connection of the concept of positive law. One has to admit, the distinction between "quasi law" and law in general sense (the latter belonging to the necessary minimum knowledge of the authority) may make the concept of law somewhat looser. But it is the consequence of reality, the uncertainity of the concept is due to the facts of legislation.

It might prove to be very difficult to draw the line between quasi legal norms, not necessarily known by the court, and norms the knowledge of which could reasonably be expected of the trained jurist. Clearly, the criteria have to be worked out by theory, the matter may not be left to the court proceeding in a case. Without carefully and reasonably determined criteria only judicial ignorance would be given justification.[13]

It also has to be admitted, that the employment of the expert of law may add to the confusion concerning the distinction between issue of fact and issue of law. Most probably, there are other reasons of concern that could be mentioned. But I believe firmly that the acceptance of the expert of law has far more advantages than disadvantages.

The expert, proving the existence and contents of certain norms of law would display his activities according to the rules concerning expert evidence. The public nature of his activity, i.e. that the parties would have direct acces to what the expert says and they could check it themselves, is a much more favourable solution from the point of view of guarantees than the informal enquiry on the part of the court. In short, the advantages of the acceptance of the possibility of employing an expert of law can be found in making use of the means of contradictorial trial. And since no more efficient model of the establishment of truth in criminal cases has been invented up to now, these advantages may not be called inconsiderable.

## VII.

According to the generally accepted ideas, the essantial element of the expert evidence is the opinion of the expert. – Discussing the expert of law, it was showing the existence and explaining the contents of certain norms that I mentioned as the essence of his role. Resorting to some grammatical or linguistic interpretation it would be easy to conclude that the expert of law does not provide an expert opinion since showing the existence or the explanation of certain norms is not an opinion. And, as it is also generally accepted that it is the opinion of the expert that is evidence in criminal procedure, the expert of law would provide only information and not evidence. Thus, the debate about the acceptability of the expert of law is empty, it is useless speculation about a nonexistent problem. However, in my opinion, the expert of law would be a participant of the evidentiary process, although he would only report the existence or the contents of a certain norm of law. Here a contradiction may be discovered, the dissolution of which seems desirable, even if it is not a real contradiction.

First of all we have to see, it is not obtaining the expert's opinion that is the single aim and justification of employing an expert in criminal procedure, although, in the majority of cases it is the apparent reason of his appointment.

As it has been mentioned in other parts of this paper, the expert provides special knowledge for the purposes of the procedure. His report, however, is usually more than reporting professional knowledge and usually (but not always) the active use of professional knowledge is needed to produce the report.

János *Székely* who interpretes professional expertise as the knowledge of certain principles of experience, writes: the expert provides his expertise for the authority, he provides principles of experience (including scientific principles). He knows, for example, what is the combustion temperature of

certain materials, what are the ways to show the presence of a certain matter, etc. In this sense, the principles of experience are principles of science or technology or techniques that could be found in books, or principles recognized by the expert in the course of his practical activities. Reporting such a principle is not a task for an expert in *Székely's* opinion, "because the opinion element is not present in it". According to him, the second task of the expert in connection with the use of the principles of experience is to apply them to known facts and to draw a conclusion, while the third type of these tasks is to percieve facts and to apply the principles of experience to them[14].

The distiction of the two latter tasks is rather uncertain, and perhaps it is not needed.

The activity requiring special expertise in practice can be of two kinds. The expert 1. provides certain professional information (even principles of experience) without any examination of any material or facts, simply on the basis of his knowledge and 2. uses his expertise to establish or evaluate certain facts. The second is more than providing information, the additional element is the professional opinion of the expert, and this is the specific element in expert evidence. For this reason it is true, that providing an opinion is the most characteristic task of the expert.

However, in my opinion, the task mentioned in item 1. may also be a task for the expert, even if it is not the most typical one in practice. It is certain that its precondition is professional knowledge on the part of the expert. It is not difficult to see that in certain cases the court and the parties need precisely this type of expert report in the evidentiary process. It is not inconcievable that someone refers to a certain scientific fact or principle used by certain professionals and someone else disputes its correctness or simply does not know about it. The expert's statement of the existence or the contents of the principle might be quite enough to decide the dispute between the interested parties. And, although it is possible, no doubt, to find the necessary information in professional books or to find it out from an advisor in an informal way, it is precisely the evidentiary value of the expert evidence that will be lost in such a process. In turn, if an expert is appointed to provide the required information, his statement can be used as evidence if the appropriate evidentiary rules are followed.

Thus, it seems, *the generally accepted views* concerning the most important characteristic features of the expert evidence *have to be revised: the expert's report may serve as evidence even if the opinion element is not present in it*. But if it is so, then there is no reason to say that the expert of law is not fit to prove the existence and contents of certain norms of law.

True, a report containing such information would not have any opinion element but the lack of that does not exclude the use of the expert's report in the evidentiary process.

The condition of producing expert evidence is that the report should be that of an expert and it should include facts the authority does not know because they belong to a field beyond the authority's province of knowledge. So, the mentioned contradiction can be dissolved by revising the con-

cepts concerning the essence of expert evidence. I doubt, however, that many scholars would be willing to proceed with such a revision just to make the idea of the expert of law less unfit for good society.

I suspect, perhaps with reason, the negative attitude toward the expert of law is due partly to the unfortunate connotations of the name. If the name not suggested that the court might need expert assistance even within its own field, or if it did not remind us of the dangers of tansferring decision on issues of law to the expert, scholarly resistance might not be so strong. Luckily, practising jurists are realists: judges ask the reporting expert without particular hesitation also about the relevant norms regulating the details for skeleton laws. And most probably, no judge would be ashamed to admit that he did not read every published legislation. [15]

## NOTES

[1] On the history of the expert in criminal procedure see, among others: Katona Géza, *Bizonyítási eszközök a XVIII–XIX. században* (Means of Evidence in the 18th and 19th Ceturies) Közgazdasági és Jogi Könyvkiadó, Budapest, 1977; Pusztai László: *Szemle a Büntető eljárásban* (Inspection in Criminal Procedure) Közgazdasági és Jogi Könyvkiadó, Budapest, 1977; Székely, János, *Szakértő az igazságszolgáltatásban* (Expert in the Administration of Justice) Közgazdasági és Jogi Könyvkiadó, Budapest, 1967.

[2] Cf. Székely, op. cit. p. 24.

[3] Cf. Székely, op. cit. p. 89.

[4] For example, the empirical study of the National Instute of Criminology and Crimianlistics. It has been found that quite frequently experts are appointed by the authorities for answering simple questions not requiring any special expertise. OKKrI Information, No 24. 1982.

[5] Cf. Sehn, A szakértői bizonyítás a bírósági eljárásban ("The problems of expert evidence in the judicial process") *Problemy Kriminalistyki* 1959, No. 20; Strogovitch, M. S. *Az anyagi igazság tana a szovjet bűnvádi eljárásban* (The Doctrine of Material Truth in Soviet Criminal Procedure) Jogi és Államigazgatási Kiadó, Budapest, 1951 (Translation); Gödöny, József, *Bizonyítás a nyomozásban* (Evidence in the Investigation) Közgazdasági és Jogi Könyvkiadó, Budapest, 1968: Vass, Kálmán, A kézírásvizsgálat helye a bizonyításban ("Examination of handwriting in the evidentiary process") *Ügyészségi Értesítő*, 1978. No. 1.

[6] Király Tibor, *Criminal Procedure, Truth and Probability*, Akadémiai Kiadó, Budapest, 1979. p. 54. and on.

[7] Cf. Gödöny, op. cit. p. 257.

[8] Cf. Király. op. cit. p. 59.

[9] Székely op. cit. p. 117–118: Vass. op. cit. 32.

[10] Cf. Székely, op. cit. p. 116.

[11] Király has pointed out that the presumption of innocence is not a presumption in the strict sense of the word and its logical structure is not that of a true presumtion, it is a rule making the deffendant's position easier. Similarly, the *jura novit curia* principle cannot be considered a presumption either. Cf. Király, Tibor, *A védelem és a védő büntető ügyekben* (Defence and Defence Counsel in Criminal Cases) Közgazdasági és Jogi Könyvkiadó, Budapest, 1962. p. 31.

[12] Kampis György, A jogalkotás mennyisége történeti alakulásának tendenciái ("The trends of the quantity changes of legislating activity from a historical perspective") *Jogtudományi Közlöny*, 1981. No. 4.

[13] The difficulties were realized by the participants of a conference organized by László Pusztai and this author in 1979. The participants all agreed with the author it is not reasonable to expect any jurist (including judges) to know the full body of valid legal norms. There was much less agreement in the question, where the line should be drawn, it was clear, however, that without criteria worked out carefully, even the concept of quasi legislations could

not be defined and certainly not the necessary minimum limit of legal knowledge on the part of the authorities.

[14] Székely, op. cit. pp. 28 – 39.

[15] In a limited empirical study, 14 judges were interviewed. Answering my questions, they all stated that they simply did not have the time to read every law and statute published in various official gazettes. One of them said the "very idea was nonsense."

## ЭКСПЕРТЫ В УГОЛОВНОМ ПРОЦЕССЕ И МИФ ТЕЗИСА „ЮРА НОВИТ КУРИА"

(Резюме)

Без применения экспертов современный уголовный процесс нельзя представить. Употребление права часто требует применения знания не юридического характера которое часто превышает круг административных знаний.

Автор в его трактате занимается толкованием понятия «специального понимания дела» которое является основнымо источником экспертиза. Исследуя пределы знания эксперта и администрации устонавливает, что принципы состязательного процесса не допускают администрации прямо использовать возможные знания относящиеся к области эксперта и чтобы она не обращала внимания на экспертиз. Занимает позицию в связи стем, что и эксперт не может высказаться в вопросах права. Зато не считает высказыванием мнения если эксперт информирует администрацию о существовании таких уставов технического характера знание которого не требуется у администрации из-за большого количества ктаих норм.

Исследуя традиционный тезис «юра новит куриа» в настоящий момент он считаетего несостоятельным. Осуждая взгляды профессиональной литературы он занимает позицию в связи с признанием так называемого юридического эксперта.

## SACHVERSTÄNDIGE IM STRAFVERFAHREN UND DER MYTHOS DER THESE JURA NOVIT CURIA

ÁRPÁD ERDEI

(Resümee)

Das moderne Strafverfahren ist ohne die Anwendung Sachverständiger unvorstellbar. Die Rechtsanwendung erfordert oft ein den Kreis der behördlichen Kenntnisse übersteigendes Wissen nicht rechtlicher Natur. Der Autor beschäftigt sich in seiner Studie mit der Interpretation des Begriffes des "besonderen Sachverständnisses", welches die grundlegende Quelle des Sachverständigengutachtens darstellt. Unter Untersuchung der Grenzen des Kenntnisbereiches der Behörden bzw. des Sachverständigen stellt er fest, daß es die Prinzipien des kontradiktorischen Verfahrens nicht erlauben, daß die Behörde ihre zum Sachverständigengebiet gehörenden eventuellen Kenntnisse unmittelbar verwendet und von der Einholung des Sachverständigengutachtens absieht. Er ist der Ansicht, daß auch der Sachverständige nicht Stellung zu rechtlichen Fragen nehmen kann. Er betrachtet es allerdings nicht als Stellungsnahme, wenn der Sachverständige die Behörde vom Vorhandensein solcher Vorschriften technischer Natur in Rechtsregelform informiert, deren Kenntnis unter Hinsicht auf die große Zahl solcher Normen von der Behörde verstandesgemäß nicht erwartet werden kann. Die traditionelle These *jura novit curia* untersuchend stellt er fest, daß diese gegenwärtig nicht mehr zu halten ist. Unter Kritik der Ansichten in der Fachliteratur nimmt er für die Anerkennung der die Existenz und den Inhalt solcher Rechtsregeln mitteilenden sog. juristischen Sachverständigen Stellung.